UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

_____

CITY OF WESTFIELD, MASSACHUSETTS, et al.,

Plaintiffs,

V.

3M COMPANY, et al.,

Defendants.

_____

Civil Action
No. 18-30027-DJC
No. 17-40002

July 12, 2018
3:10 p.m.

TRANSCRIPT OF MOTION HEARING

BEFORE THE HONORABLE DENISE J. CASPER

UNITED STATES DISTRICT COURT

JOHN J. MOAKLEY U.S. COURTHOUSE

1 COURTHOUSE WAY

BOSTON, MA 02210

DEBRA M. JOYCE, RMR, CRR, FCRR
Official Court Reporter
John J. Moakley U.S. Courthouse
1 Courthouse Way, Room 5204
Boston, MA 02210
joycedebra@gmail.com

APPEARANCES:

FOR THE PLAINTIFFS:

RICHARD W. HEAD, ESQ.
SL Environmental Law Group PC
450 Mission Street, Suite 400
San Francisco, CA 94105
415-348-8300

JOHN E. GARBER, ESQ.
Weinberg & Garber, P.C.
71 King Street
Northampton, MA 01060
413-582-6886

ROBERT D. COX, JR., ESQ.
Bowditch & Dewey LLP
311 Main Street
P.O. Box 15156
Worcester, MA 01615
508-926-3409

FOR THE DEFENDANTS:

JOHN D. STUEBING, ESQ.
Tarlow, Breed, Hart & Rodgers PC
101 Huntington Avenue
Boston, MA 02199
617-218-2067

MICHAEL A. SCODRO, ESQ.
Mayer Brown LLP
71 S. Wacker Drive
Chicago, IL 60606
312-701-8886

DAVID WEINRAUB, ESQ.
DOUGLAS E. FLEMING, III, ESQ.
Dechert LLP
1095 Avenue of the Americas
New York, NY 10036
212-698-3500

LINDSAY M. BURKE, ESQ.
Kenney & Sams, P.C.
225 Turnpike Road
Southborough, MA 01772
617-634-9325

APPEARANCES (CONT'D)

CHRISTOPHER M. REILLY, ESQ.
Sloane & Walsh
Three Center Plaza
Boston, MA 02108
617-523-6010

MICHAEL E. PASTORE, ESQ.
Greenberg Traurig LLP
One International Place
Boston, MA 02110
617-310-6277

P R O C E E D I N G S

(The following proceedings were held in open court before the Honorable Denise J. Casper, United States District Judge, United States District Court, District of Massachusetts, at the John J. Moakley United States Courthouse, 1 Courthouse Way, Boston, Massachusetts, on July 12, 2018.)

THE CLERK: Court is in session. Please be seated.

Civil action 18-30027, City of Westfield v. 3M.

Counsel, please state your name for the record.

MR. HEAD: Richard Head from the SL Environmental Law Group for the plaintiff.

MR. GARBER: John Garber, your Honor, Assistant City Solicitor for the City of Westfield.

THE COURT: Good afternoon, counsel.

MR. FLEMING: Doug Fleming, your Honor, for the defendants Tyco Fire Products and Chemguard.

MR. SCODRO: Michael Scodro, your Honor, for the defendant 3M.

MR. WEINRAUB: David Weinraub for defendant Tyco and Chemguard.

THE COURT: Good afternoon, counsel.

MS. BURKE: Good afternoon, your Honor. Lindsay Burke, also for Tyco and Chemguard.

MR. STUEBING: John Stuebing, your Honor, for 3M.

THE COURT: Good afternoon.

Counsel, I know we're here for defendants' motion to dismiss. I apologize for starting a little bit later than our scheduled time. We had a full courtroom for the prior proceeding.

Counsel, I'm prepared to hear argument. You're not writing on a completely blank slate here. I'm familiar with the arguments to some extent, but I'll hear you, counsel.

MR. FLEMING: Your Honor, if I may, I'd be happy to hand this up to you. The defendants coordinated to try to break up the argument to avoid duplication. We've got a proposed sequence of the arguments as between Westfield and the County of Barnstable action that we shared with Mr. Head that I'd be happy to hand up.

THE COURT: Sure, thank you.

MR. FLEMING: On the first side, your Honor, has the proposed sequence of the arguments. On the backside of the document, it has a checklist of the various causes of action in each action.

And what we would propose is that Mr. Scodro argue the City of Westfield motion to dismiss, who represents 3M on behalf of the defendants, and that I would argue the County of Barnstable motion to dismiss on behalf of the defendants as well. I represent Chemguard and Tyco Fire.

THE COURT: Okay.

MR. FLEMING: Thank you, your Honor.

THE COURT: Counsel, is that acceptable?

MR. HEAD: Certainly, your Honor.

THE COURT: So why don't we begin with that outline and sequence in mind, counsel.

MR. SCODRO: Your Honor, it's Michael Scodro on behalf of defendant 3M, as Mr. Fleming said, arguing on behalf of both defendants for purposes of this argument.

Your Honor, we would begin, naturally, with personal jurisdiction in this case. Obviously the briefs have covered this in some detail, but I'll begin very quickly with general jurisdiction. I'm not sure that a lot needs to be said on this.

Since the Supreme Court's decision in Goodyear Tire in 2011 and then Daimler Chrysler in 2014, it's clear that absent an extraordinary circumstance -- and the Supreme Court has to date identified only one -- general jurisdiction lies only for a corporation in its -- where it has its principal place of business and where it is incorporated. And for neither defendant in this case is that the state of Massachusetts.

So unless your Honor has questions on general jurisdiction, I'll turn briefly to specific jurisdiction.

THE COURT: Thank you.

MR. SCODRO: Thank you, your Honor.

The plaintiff continues to rely on the stream of commerce idea, but this notion was substantially revised in the

Supreme Court's Asahi decision, your Honor, in 1987, and this court and the first district have explicated that notion far further since then.

We know from the Supreme Court's decision in Walden in 2014 that there needs to be suit-related conduct in the state, and that those -- that conduct or those contacts have to be something that the defendant itself creates.

To flesh out that standard, we have three factors: relatedness, purposeful availment, and reasonableness.

Your Honor, the plaintiff here has failed to allege either relatedness or purposeful availment. Either one of those is fatal to their personal jurisdiction claim.

I'll briefly address relatedness each in the first instance, your Honor.

The in-state conduct that gives birth to the cause of action has to be related to the claims. And nothing says this more clearly than the Supreme Court's 2017 decision in Bristol-Myers Squibb which makes clear that unconnected activity in the state is irrelevant for purposes of the specific jurisdiction analysis.

Your Honor, when it comes to the relatedness prong in this case, all that plaintiff alleges and all that plaintiff offers in their response to the motion to dismiss as to both defendants is unrelated conduct. That is, for example, the fact that there's an unrelated plant in the jurisdiction.

Bristol-Myers Squibb makes perfectly clear that that cannot be considered as part of the specific jurisdictional analysis.

And indeed, when we turn to purposeful availment, the second prong, again, this is after they have failed relatedness. When it comes to purposeful availment, the 1st Circuit has been very clear, it follows the plurality in Asahi, mere stream of commerce is insufficient, something more is needed, and that something more also has to be specific to the cause of action, to the conduct that's being challenged. And there's simply nothing remotely like that alleged in this case, your Honor.

The claim, and it's very clear in the complaint in multiple paragraphs, is that the defendants sold their product, AFFF, which is a firefighting foam, they sold that product to the United States military, not even to a distributor -- and putting to one side the fact that there are numerous cases from this district and from the 1st Circuit that make clear that even selling to a distributor is okay when it ends up in Massachusetts, it does not give rise to specific jurisdiction. But even putting that to one side, in this case, the allegation is that the defendants sold their products to the end user, to the customer, and the customer then happened to use that product in Massachusetts.

1st Circuit cases, including Boit and Rodriguez, which we cite in our brief, this Court's decision in Newman is

extremely close to this, your Honor, where the airplane at issue was sold to a distributor. In that case, there was even an allegation that the distributor -- it wasn't the end user -- the distributor was a corporate affiliate of the defendant corporation in that case, and still the Court correctly held that's insufficient to find purposeful availment for purposes of due process of specific jurisdiction in the Commonwealth of Massachusetts.

So there is no question that in this case there simply are no allegations that would give rise to either relatedness or purposeful availment. And indeed, to the contrary, by affirmatively pleading that material was sold to the customer who then happened to use it in Massachusetts and elsewhere is perfectly clear, this would be the first court to be finding that specific jurisdiction exists under those circumstances. Indeed, it would be flatly inconsistent with rulings from this district and from the 1st Circuit.

And finally, your Honor, because their specific jurisdiction claim fails both on relatedness and purposeful availment grounds, there's, of course, no need for the Court to reach the reasonableness question. This Court said as much in Katz, the Supreme Court said as much in Daimler Chrysler.

Your Honor, at the end of the discovery section the plaintiff asks for jurisdictional -- sorry, at the end jurisdictional section, the plaintiff asks for jurisdictional

discovery. We would urge the Court to deny that request. To be sure, as we've said, the complaint offers nothing to sustain jurisdiction within the meaning of due process in this case. But this Court's own decision in Horizon Comics Production, the 1st Circuit's decision in Negron-Torres, both of which we cite in our brief --

THE COURT: What is the standard for deciding whether or not there should be jurisdictional discovery? Meaning, there's a colorable claim of jurisdiction? Meaning, what's the standard by which the court decides that?

MR. SCODRO: Thank you, your Honor. In Horizon Comics Production, this Court said that it is -- while it's a discretionary standard, the threshold showing requires a colorable claim, exactly as your Honor said, and some indication of how discovery would further the showing of jurisdiction in this case. And the Negron-Torres case from 2007 in the 1st Circuit, which I mentioned a moment ago, that elaborates on that standard as well, your Honor, and says that the plaintiff must present some facts or at least allege some facts to show why personal jurisdiction -- excuse me, why discovery would help to establish jurisdiction.

In this case, your Honor, the way the complaint is pled by alleging that we sold to a customer who in its own -- under its own power -- certainly no one would contend that we control where the military uses AFFF -- by making that

allegation, your Honor, I am hard-pressed to think of anything, any fact that they could seek to establish specific jurisdiction in this case, your Honor. So that's why we would urge the Court to deny any request for jurisdictional discovery here.

THE COURT: Thank you.

MR. SCODRO: Your Honor, I'm happy to pause at this point if you want to treat jurisdiction separately, or I'm happy to proceed through the merits arguments as well.

THE COURT: Well, counsel, do you want to respond to that, and then we can go onto the merits?

MR. HEAD: Sure.

THE COURT: Thank you.

MR. HEAD: Thank you. Again, Richard Head for the city.

THE COURT: Thank you.

MR. HEAD: The complaint alleges significantly more than what has been stated relative to the jurisdiction of these two defendants, and also as we had put in our response brief there are public records relative to their contacts in the Commonwealth of Massachusetts, both with regard to 3M and Tyco, Tyco specifically with regard to AFFF distributors located within the Commonwealth, one of which is within the county where the City of Westfield is located. So there is a direct connection relative to AFFF and Tyco within the Commonwealth of

Massachusetts. And 3M itself has a significant presence in the Commonwealth of Massachusetts.

The other -- the aspects within the complaint alleging contacts with the Commonwealth of Massachusetts is that it does, in fact, engage in substantial and continuous and systematic contacts with the Commonwealth. It is not a fact, as was argued by counsel, that it just happened to be used in -- at this particular location. This is a product that is designed specifically for military use on all military bases throughout the United States. It is absolutely more than foreseeable, but it is intended that by selling to the military that it is going to be used, and that product is going to be used in military bases, such as the one that's located in the City of Westfield.

So it is not a product that is like most any other product. It has a very specific use. In fact, it has to meet military specifications in order to be sold to the military. Not anybody can provide this product.

THE COURT: What about the relatedness prong, counsel? What's the best argument in that regard?

MR. HEAD: The contacts with the Commonwealth of Massachusetts in the allegations are directly related to the behavior of the defendants. They sold this product. They specifically instruct on how this product should be used, military bases and non-military bases, that the product is

designed in a way that it is supposed to be sprayed on the ground that directly causes the contamination that is at issue in this case. Their contacts with the state -- with the Commonwealth of Massachusetts are that they sold directly for the purpose, for the very specific purpose that it be used at military bases, exactly like the situation we have here, where it was used -- the product was used specifically as designed and instructed by these defendants.

So the claim is directly related to those contacts relative to their sale and advertise of a product that was used and designed for a very specific purpose, which is for use on military bases to put out liquid gasoline fires, such as what you might see with an airplane.

So the contacts are directly related to the complaint and the allegations that we have.

And it's also in terms of purposefulness, it is more than a random fortuitous event. It is a very specifically designed activity on the part of these defendants that this product be used at this particular facility. It is the entire nature of this product. So it is not what would be described as simply fortuitous or attenuated, but it is direct and related.

And then with regard to the reasonableness factors, I think they're fairly clearly laid out in our brief. They're the six -- or the five factors, pretty straightforward. I

don't think I need to review those directly in argument, but I think they're very well laid out in the brief.

So I would simply say that it is not that it happened to be used at this particular facility, but that it was designed to be used at this facility. And it was sold and marketed to be used at this facility, as with all the other military bases that they sold their product to. So it was designed and intended to be used at this facility.

Simply the fact that they did not sell it directly to somebody located in the City of Westfield is not the relevant standard. It was, in fact, designed and marketed and sold to be used at the military bases, including this one.

I think that's the basic argument.

THE COURT: Am I correct it was designed to be used at military bases, not specifically this one, but at military bases?

MR. HEAD: All military bases, that's exactly right.

THE COURT: But doesn't that make a difference for the purposes of personal jurisdiction in this district?

MR. HEAD: It doesn't, because it's a product -- simply because they sold it to the United States military, it was -- that's just the way the military purchases their goods. It was designed and understood to be used at all the facilities, such as this one. So it's not by happenstance that it's being used here, but it's by direct intent that it's being

used at this particular facility.

Simply because it's used at other facilities throughout the United States doesn't change the analysis relative to the Commonwealth of Massachusetts. The nature of this product and its intent by these defendants was that it was to be sold to this Air Force base or the Air National Guard that uses this particular airport.

So, no, I would say it's directly related and it is a purposeful availment of the jurisdiction of the Commonwealth of Massachusetts by virtue of who its client is, its understanding how it would be held and would be used.

THE COURT: Thank you.

Counsel, why don't we -- I'll move back to the defendants to start on the merits. As opposed to allowing rebuttal as to each of these, why don't I allow some general rebuttal at the end.

MR. SCODRO: I was going to ask, I have a few points to make in response, your Honor. Should I reserve on those?

THE COURT: Why don't we do that.

MR. SCODRO: With regard to proximate cause, there's no dispute between the parties that proximate cause is an element of all four causes of action raised in the complaint, nor is there any dispute of what proximate cause means and its various subelements: foreseeability, but-for, causation, and substantial factor, your Honor.

The problem here for the plaintiff is that their complaint not only doesn't plead causation but it affirmatively pleads against causation to a certain extent, your Honor.

They claim here -- and they make this very clear in their response because this is necessary to avoid any potential statute of limitations issue -- that the harm they suffered, the need to remediate and filter and so forth, didn't arise until May of 2016 when the EPA issued its non-binding advisory at 70 parts per trillion, your Honor. And because they have made that admission, the suggestion, therefore, is that -- and they have made this express in the complaint as well -- that at no other time, at no point prior to May of 2016, were the limits in their various wells at all in excess of anything that the government, the EPA or otherwise, had said would be too high a level.

So their claim is that they were forced to remediate because, as of May, suddenly now they are in excess of EPA level.

The problem is they don't allege that in 2016 or even in 2017 that the levels at any of the wells were in excess of the EPA's 70 parts per trillion number. On the contrary, your Honor, in paragraph 77 of the complaint, they include a chart, and the chart shows well samples taken at various points in the year 2013. And what those show is that at that point the numbers were too high, but they actually show a significant

decrease in both of the chemicals that are at issue in this case even over the short time frame that appears in that chart; namely, February through August, I believe. And they show in one case with regard to PFOA and PFOS one of them decreases by roughly 33 percent, another by 25 percent.

The complaint actually does more. The complaint explains why that is. The complaint talks about the fact that these chemicals migrate in groundwater, that the plume, as it's called, can move through the earth. So the complaint both explains why one would expect changes in these numbers and shows that they were on the decline rapidly three years before they would need to exceed the EPA limit in order for there to be any damage whatsoever in this case.

Now, your Honor, their only response to that in their responsive pleading is to attach something that is -- it's an interim report. It is not a public document, at least we've been unable to find it in any public place. It is known as -- it is captioned "interim," there's going to be additional work done, that's clear from the Interim Tactical Memorandum is the name on it. This is it from 2017, and it purports to show that in one well, sampling showed numbers in excess of the EPA 70 parts per trillion.

Plaintiffs urge the Court to take judicial notice of this document. It's the only way they can salvage an allegation of proximate cause in their complaint. But, your

Honor, as we point out in reply, this document comes nowhere close to the sort of self-sustaining document that one would consider for purposes of judicial notice.

Your Honor was very careful in the December County of Barnstable case to cabin the use of judicial discretion to instances where they were truly public documents with irrefutable facts. And even in those circumstances, the Court's opinion frequently said it would only use those documents for purposes of notice for the discovery period for purposes of statute of limitations. Even there the Court wasn't taking notice of them for the truth of the matter asserted, but that's precisely what plaintiffs urge this Court to do with this self-styled Interim Tactical Memorandum involving limited testing on one of the wells.

And so we believe that this comes nowhere near the requirements for judicial notice. And accordingly, without it -- and I'm not sure plaintiffs would even disagree -- without that document the complaint simply fails to allege any kind of proximate cause here by failing to allege that the numbers were too high when they engaged in the remedial conduct, your Honor.

THE COURT: Thank you.

Counsel, I apologize, I should have mentioned this to both sides at the beginning. I do need to be off the bench at 4:00. I'm assuming, counsel, we can deal with everything here,

but I didn't want to get to 4:00 and then say that. So, counsel, I'll say that to both sides.

Did plaintiff want to respond to that issue?

MR. HEAD: Yes, your Honor, thank you.

So the -- I would point your Honor to paragraph 80 of our complaint, where we specifically say and allege --

THE COURT: And I'll just tell both sides I have copies of both operative complaints here.

MR. HEAD: Thank you, your Honor.

And that prior to May 25, 2016 health advisory, the levels of PFOS and PFOA were below. Paragraph 81, following EPA's publication, the City of Westfield was required to take specific action relative to its drinking water sources as a result of the EPA's issuance of the health advisory.

The loss that we're talking about is and the allegations within the complaint do allege and specifically allege foreseeability and consequence of the defendants' conduct as the cause of the damage that the City of Westfield is now suffering from.

The AFFF that we're talking about that is contaminated with the PFOS and PFOA was specifically used and designed by the defendant to be sprayed on the ground so that every use of its product would result in the contamination of the soil and groundwater.

We've also alleged the specific knowledge that these

defendants had relative to the risks associated with their product, and that those -- as a result of the introduction of those products into the -- and used at the airport has resulted, specifically resulted in damage to the City of Westfield as it relates to the health advisory that was issued by EPA.

In addition, we've alleged that given the flow of groundwater that additional wells are directly in line to be affected and damaged and specifically costing the City of Westfield additional sums of money as a result of the contamination that is in the groundwater.

So I strongly disagree in terms of the level of pleadings that are contained within the city's complaint. We've alleged proximate cause, we've alleged damages that directly relate to the activities that are a foreseeable consequence of the defendants' conduct, and that those were tied to the issuance of the health advisory by the Environmental Protection Agency.

In addition, as we did put in our brief, there is additional data in what we had turned into is essentially -- this is a motion to dismiss phase, not a summary judgment. There's data, there's discovery that will happen relative to proximate cause. Typically proximate cause is a question of fact, and the pleading as stated sufficiently alleges proximate cause to survive a motion to dismiss.

I'm happy to address it if you want, in terms of -- this is going back to the personal discovery -- I didn't address the discovery request that we had contained in our motion; but there is, I would argue, a great deal of information that could result from discovery if the Court deems it necessary.

THE COURT: I thought you did address --

MR. HEAD: I didn't talk about it significantly, but I just want to make sure on the record there is --

THE COURT: I understood the argument.

MR. HEAD: Thank you.

THE COURT: Thank you.

Counsel, I think you had feasible alternative design next.

MR. SCODRO: Thank you, your Honor. I'll be very quick in light of the Court's time as well.

Very briefly, your Honor, this is covered well, I think, in the parties' papers.

There is no dispute that there needs to be an available and technologically feasible practical alternative in order to make their design defect claim. So this count, this argument obviously goes to a single count, unlike the prior two that covered the entire complaint.

Plaintiffs have simply failed to do that here. Again, your Honor, they have affirmatively -- and here this is quite

clear -- they have affirmatively argued or pled themselves out of court on that element.

They've attached to their complaint a GAO report that makes very clear, and it's consistent with the fact that the military specifications continue to insist on AFFF that includes these PFAS chemicals. The GAO report that they attach to their complaint on pages 18 through 20 makes crystal clear that the military itself has yet to find any feasible alternative, and they haven't even set a deadline for when they might be able to do so.

If the plaintiff were correct and that all you needed to do was take the PFAS out and that that was a feasible alternative, surely the military would have done that by now instead of telling other government actors that they're going to need an indefinite period to figure out if anything can take the place of PFAS. I would just say to rule for them in this context, your Honor, would run afoul of a number of decisions cited in our brief, including the Town of Lexington where the claim there was that one would -- could simply craft the same substance without using PCBs, and the Court correctly said --

THE COURT: I do remember, counsel.

MR. SCODRO: Right -- what do we do without them.

THE COURT: Counsel.

MR. HEAD: Your Honor, I think what we're doing is starting to expand our use of acronyms, take a class of

chemicals when we're really talking about two.

PFAS, which you just heard referenced, are per- and polyfluoroalkyl substances. There are 3,000 some-odd PFASs out there in the world. What we are talking about are two, PFOS and PFOA, and these are the only two that we're talking about. And we're talking about whether or not there was feasible alternatives to having AFFF with PFOS and PFOA. These are two members of a class of PFASs. And what we've alleged -- and this is a motion to dismiss phase, not a summary judgment phase -- and we very specifically have alleged in our complaint is that there's an alternative design that is feasible -- and feasibility is, in fact, the standard and the test by which measurement would be alternative design -- and that would be at paragraph 99 and also paragraph 37 of our complaint.

So we've very specifically alleged that there are feasible alternative designs that are commercially viable, and that the defendants failed to do that, even though they had sufficient knowledge when they were manufacturing this product and failed to do that. In fact, there are alternatives to AFFF that do not contain PFOS and PFOA in the same way that's designed as the products that were being sold and used at the airport.

So as we have alleged it in terms of a motion to dismiss phase, the feasibility argument and the alternative design argument has been preserved within the complaint.

Thank you, your Honor.

THE COURT: Thank you.

Counsel, as to the 93A claim.

MR. SCODRO: Yes, your Honor. Very, very quickly on 93A, if possible, 60 seconds for rebuttal at the end, just a few points if possible.

On 93A, as we point out in our brief, this is a business transaction. It's a Section 11 transaction, and there is -- they are not privy to the same -- to use the same word, the same transaction, your Honor, and that's what Section 11 requires. Even if this were a Section 9 consumer claim -- and it isn't for the reasons identified in our brief -- even if it were, the case law is clear, the plaintiff still has to be a purchaser, could be an indirect purchaser, but a purchaser, or a user of the product, or in some other way involved in the transaction. None of those are true here.

Here they're claiming that they have stepped in to remediate without any connection, without any use of the product or any transactional connection to the plaintiff. So even under Section 9 -- and this is improperly pled as a Section 9 case -- even under Section 9 it fails as a matter of law; and it does so even more clearly under Section 11, which is the proper section here, your Honor.

THE COURT: Counsel, I'll let you respond.

MR. HEAD: Thank you, your Honor. I don't have a lot

more to expand on than what's already in our brief.

One is that it is not a Section 11. We didn't have a business relationship, whereas any other consumer that is harmed by a product that is put into the marketplace by unfair or deceptive trade practices. We clearly outlined the unfair deceptive trade practices, and for the reasons we stated, Section 9 is the appropriate one, because we are simply an innocent harmed party as a result of those unfair, deceptive trade practices.

And then, you know, we've cited the cases in our responsive brief relative to the transactional relationship. We certainly alleged the -- that a products liability case, such as this, the lack of a direct or indirect transactional relationship is not fatal to a 93A claim.

Thank you.

THE COURT: Thank you.

Counsel, I'll give you a moment for rebuttal, and then we'll turn to Barnstable.

MR. SCODRO: Thank you, your Honor. I'll keep this very brief.

With regard to personal jurisdiction, your Honor's question hit the nail on the head. They responded that this product was not designed for the Massachusetts airport. Their allegation that it's made for the military would be -- that would be tantamount to overturning the Block decision in -- or

Boit decision in the 1st Circuit, because those products were made for construction workers, or the Newman decision by this Court, because those were airplanes made for airports.

The point would be they would have to -- and they candidly conceded today that this was not designed for the Massachusetts air base, and that under the case law is dispositive, your Honor.

Turning quickly to proximate cause. The paragraphs in the complaint that they identify, 80, 81, 82, those are precisely what we're talking about. Those talk about data from 2013 and a decision by the plaintiffs to remediate and take other measures for which they now seek compensation based entirely on data that was -- that is now -- now coming up on five years old.

The point of the matter is that that simply -- you cannot look at 2013 data, which, by the way, showed a decline, a rapid decline, and say that action we took in response to that is somehow proximately caused by defendants' actions.

Finally, turning quickly to the design defect. Your Honor, they're now claiming that PFOA and PFOS, somehow the complaint is limited to those. As we point out in our brief and reply brief, there are numerous paragraphs, the guts of the complaint, paragraph 36, 55, and paragraphs that follow 55, they are all focused on PFAS and the harms that it can cause. So to suggest now that the complaint is limited to these others

is simply untrue, your Honor, and is inconsistent with the way the case has been pled.

And finally, your Honor, their answer to why this is, in fact, a Section 9 case is that there was no commercial transaction. But the very case they cite for that proposition at the end of their brief, your Honor, goes on to say that the fact that there's no commercial transaction between the parties doesn't mean that it suddenly becomes a Section 9 case. It may just mean that it's a failed Section 11 case. And that's what we have here, your Honor.

THE COURT: Thank you.

MR. HEAD: Your Honor, there was one thing that was stated I think I just need to clarify.

THE COURT: Thirty seconds, counsel.

MR. HEAD: Thank you, your Honor.

Where he said that we admitted it was not designed for the Massachusetts Air Force base. What I said was it was not sold to the Massachusetts Air Force base that we know of. But I do think that's exactly one of the issues that we would want to raise in discovery, if the Court allowed discovery on jurisdiction, is what were the specific relationships with this Air Force base and these defendants.

So we did not say that it was not designed for this Air Force base, but at least as we know today, I don't have information that says it was directly sold with the purpose of

coming to this Air Force base, but discovery would flush that out at some level in some more detail that we don't currently have available to us. Thank you.

THE COURT: Thank you.

Counsel, to turn to Barnstable.

MR. FLEMING: Yes, thank you, your Honor.

MR. HEAD: Your Honor, if it's okay with you, the City Solicitor for Westfield, he can either stay with me --

THE COURT: Counsel, your choice.

Counsel.

MR. FLEMING: Thank you, your Honor.

THE COURT: And if anyone else has to move around.

MR. HEAD: Just Attorney Cox is here for the City of Barnstable, but I'm happy to leave it the way we are.

THE COURT: Okay, thank you.

Good afternoon.

MR. FLEMING: Thank you, your Honor.

In the interest of time, I'll try to be as brief as I can.

THE COURT: Sure.

MR. FLEMING: Again, this is an action by the County of Barnstable relating to its fire training academy and the use of AFFF at its fire training academy by others, not the manufacturer defendants.

Your Honor, we've asserted that under Twombly and

Iqbal the plaintiff still hasn't cured the deficiencies that you cited in the prior complaint that caused you to dismiss that complaint without prejudice. In the interest of time, I'd be content to rest on that argument, I think it's adequately briefed, and move on to the count-specific arguments.

THE COURT: Sure.

MR. FLEMING: The Twombly and Iqbal arguments cut across the entire panoply of claims.

You could break down the seven counts or causes of action in the complaint into three buckets: The first bucket is Counts I through III for property damage; the second bucket is Counts VI and IV for contribution or indemnification relating to the litigation that the town brought against the county; and then the third bucket would be for the county's response costs.

And I'll pause there, because Mr. Head -- and I'll let you speak, Mr. Head, of course -- mentioned to me in the hallway that you may be dropping one of these counts.

MR. HEAD: That's correct, your Honor. Relative -- I will file the paperwork following this hearing -- but for the indemnification claim, the common law indemnification claim, we'll file a notice of dismissal of that particular count, which is Count IV I believe --

THE COURT: Okay.

MR. HEAD: -- don't hold me to that, but we'll file

that following this hearing.

THE COURT: Okay, thank you.

MR. HEAD: And it will just be limited to the common law indemnification.

MR. FLEMING: Thank you, Mr. Head. Thank you, your Honor.

So if I could turn to the first bucket, Counts I through III, these are common law tort causes of action purportedly seeking to recover for property damages. There's a failure to warn claim, a design defect claim, and a negligence claim. We believe these claims should clearly be dismissed because while they're denominated as property damage claims, when you review them, they really are seeking response costs. And in your prior ruling, your Honor, we think you were clear that in order to recover for response costs, you have to proceed under Chapter 21E. I think in your prior decision, your Honor, you also said that if you allege damages that are separate and apart from response costs, maybe that's another question. But here, when you look at the damages allegations that they plead in support of Counts I and III, they're virtually identical, they're substantively identical to the very part that you quoted from their former cause of action in the prior complaint that you dismissed finding that there's no common law claim for indemnification or contribution for response costs.

You quoted that they were asserting response action damages and damages resulting from, quote, investigation, cleanup, abatement, remediation, and monitoring costs. That's what you quoted at page 28 of your prior opinion. When you look at paragraphs 121, 130, and 135 supporting Counts I through III, it's the identical language.

So, in short, your Honor, without belaboring it, they're again pleading response costs and trying to evade the response costs statute under the rubric of these common law property damages claims, which I think you've already ruled they cannot do.

So I'm happy to pause there, your Honor, unless you have any questions.

THE COURT: I'll let your brothers respond.

Counsel, who's --

MR. HEAD: Thank you, your Honor. I do have some comments relative to the causation and the contribution arguments that they have raised. We appear to have skipped those, but I'm happy to address those specifically. Just a couple of direct comments relative to what was alleged.

In terms of the causation, we have modified, amended the complaint to specifically allege that these defendants have -- their product was specifically used at the Barnstable County facility, that the Hyannis Fire Department specifically brought these defendants' products to the county facility, and

that, as a result of the use of the product in the manner in which it was designed and intended, it was sprayed on the ground and every time it was sprayed on the ground, resulted in contamination of ground and soil water.

I apologize, I don't mean to talk fast, I know we're under a timeline.

THE COURT: I'm following you.

MR. HEAD: On the contribution issue, again, this is the issue under Mass. General Law 231B. It's a question of whether or not it's under subsection 3(d) or 3(c) and whether or not there was a judgment in the town versus county lawsuit. And there are two parts to that. One is that there is a judgment, as that term is defined under the Rules of Civil Procedure for the Commonwealth of Massachusetts. I think this specific issue, while there has been litigation on this and decisions, that there has not been a decision on this issue from the Supreme Judicial Court, and it is entirely about Massachusetts law and interpretation of Massachusetts statutes and Massachusetts Rules of Civil Procedure. And it may be, as the Court is deliberating on this issue, an issue that should be certified to the Mass. Supreme Court because of the uniqueness of the circumstances.

But also I would argue that even under Section 3(d), the judgment that was entered was entered within the statute of limitations, and as a result of being entered with the court

within the statute of limitations, release of all the defendants was not necessary. And that's part one under section 3(d) of 231B.

Relative to the issue of property damage, the allegations and the rule relative to what is property damage, within Massachusetts law you have to demonstrate the level of contamination has decreased the fair market value or necessitates remediation.

They bring up that the proper way of bringing up response costs is through 21E, but these defendants have denied that they're responsible under 21E. So one or the other has to give. But if -- so under our common law theory of property damage, one, if the 21E counts were to be dismissed, we should have and we can have our common law counts for property damage.

But we also have not simply alleged remediation, but we've also alleged other damage.

So paragraph 107, 107 of our complaint talks about the contamination of plaintiff's property and groundwater which has caused damage.

Paragraph 121 alleges that the county has suffered and needs to remediate and has suffered other damages.

Paragraph 124 alleges that the groundwater and drinking water has been damaged.

Again, paragraph 130 alleges remediation and other damages.

Paragraphs 114, 123 allege harm to soil and groundwater.

And that the paragraph 135, again, seeks remediation and other damages.

These are entirely consistent with the definition of property damage with the Commonwealth of Massachusetts, which is measured by the diminution of property value or, if it is curable through remediation, then the cost of remediation. So we have a common law count relative to that.

We're not seeking double recovery, but to the extent, one, if 21E survives and we continue on with 21E, it would only be those costs, those other damages that are not covered through the contribution or the need to do -- for remediation, but it is other damages, diminution of property value.

So we have, in fact, alleged and the complaint survives the motion to dismiss as alleged and as pled.

Thank you, your Honor.

THE COURT: Thank you.

MR. FLEMING: Thank you, your Honor. So I think Mr. Head got a step ahead of me. He went to the next argument that I haven't argued yet, so I'll kind of --

MR. HEAD: Sorry.

THE COURT: Yes.

MR. FLEMING: I know you wanted to get it in quickly.

So I'll address, your Honor, their now contribution

claim relating to their settlement of the action that the town brought against the county. And at the end of the day, we think this is extremely clear under Massachusetts contribution statute, Chapter 231B, right, if you have a settlement during a litigation, you have to discharge the common liability in order to go after a third party, right. You have to discharge that common liability. The statute is very clear. The only way that they try to get around that is to say that, Well, the statute expressly says that that does not apply in case there was a judgment.

And here, they're making the argument that the stipulation of dismissal or the agreement of judgment that was filed relating to the settlement constitutes a judgment within the meaning of the statute.

And of course that just cannot be. Anytime a lawsuit is settled, there's a stipulation of dismissal filed, you would completely eviscerate the statute if parties could simply not discharge the common liability, file a stipulation of dismissal or agreement of judgment during the litigation and end it, which is always done, and completely evade the strictures of the statute.

The Breon case, which we cited in our brief, which was partially vacated on other grounds, recognized exactly this. It's squarely on point. The statute wouldn't make any sense. I think it would wreak havoc with the Massachusetts

contribution statute if their interpretation were adopted. The statute would never have any effect. Every time there's a settlement, someone would file a stipulation, say that's a judgment. That's not the type of judgment the statute is referring to, and the statute just would simply never apply in a Section 3(d). So, respectfully, we just don't think that argument is tenable in any way whatsoever.

Your Honor, I think since he's already addressed it, I'll continue to the next section, however you want to proceed.

THE COURT: I think that's fair.

MR. FLEMING: Up to you.

MR. HEAD: One brief comment in response since --

THE COURT: Why don't I let your brother finish, and then I'll give you final word as to both.

MR. FLEMING: And if I may, I'll reserve time on Twombly and the property damage allegations that I started with.

THE COURT: Sure.

MR. FLEMING: But, your Honor, the third bucket is the response clause claim, which is at Count V. Your Honor previously ruled, we believe correctly, that to the extent plaintiffs have alleged something in their complaint, they're really seeking response costs. We pointed out to the Court previously, and to Mr. Head, that if they do seek response costs, we're probably going to be back here again. Because

when you take a look at the statute and you have a decision squarely on point, we don't believe the manufacture defendants meet the definition of persons liable under Section 5(a) of 21E. In the city of -- Town of Westport case; excuse me, your Honor, you ruled, quote, Westport has not alleged that defendants caused the release aside from such manufacture and sale, nor has Westport alleged that defendants transported -- in that case it was PCBs -- PCBs or otherwise interacted with Westport's property aside from the boilerplate language of 5(a) 3 through 5, and I inserted the word "boilerplate."

And that's the same thing that we have here, your Honor. They're basically alleging that the manufacture defendants are persons liable under the statute in the same way that the plaintiff in Town of Westport alleged that Monsanto was.

Now, in their brief they make some arguments that the defendants arrange for the transport. But I think the Town of Westport would show that that's not enough. And second, they really have not alleged that in their complaint. They claim that in their brief. They really haven't alleged any facts to that effect in their complaint.

There's no interaction alleged by the defendants with regard to this product at issue with the sites. And that's key to satisfying the prong for persons liable under the statute.

And further, this idea that, well, you know, if

they're not persons liable under the response cost statute, even though we're seeking response costs, we can still just assert common law damages. Again, I think that would eviscerate the purpose of the statute. The purpose of the statute was to carefully craft sort of this system for dealing with response costs in these types of situations. I don't think the statute was defining persons liable and saying, you know what, never mind, if you're not meeting this definition, we're going to have a whole lot of litigation; we're going to extend it to product manufacturers as well. I think the legislature could have done that if it wanted to, and it decided not to do that.

Thank you, your Honor.

THE COURT: Counsel, we have a few minutes left. I'll split the time between you. You can just give me your final remarks, counsel. Certainly, both sides have given me a lot to think about. I've thought about some of these issues before, but I will consider it in the context of the pleadings before me now.

Counsel.

MR. HEAD: Thank you, your Honor.

On the persons liable 21E issue, this is significantly different than the Westport case. Westport was an ingredient manufacturer of a final product. These defendants are the manufacturer of a final product. There are allegations

relative to information and knowledge that these defendants had, in fact, a specific campaign to ensure that scientific research on PFAS was not distributed publicly, was not given to the regulators. And that they knew that if regulators became aware of its risk, they would be forced to halt the manufacture of their product. That's alleged in the complaint.

This is a product that when it is used as designed, it is sprayed directly on the ground, and every time it is sprayed on the ground it is going to cause soil and groundwater contamination because these are products that contain PFOS and PFOA and because of that, when you spray it on the ground, it is going to contaminate the soil and the groundwater with PFOS and PFOA. They did, as alleged, cause the contamination by virtue of their failure to properly disclose to the regulators the information they had relative to the effects of these products, that they were designed to be used in a way that was going to by design put this product in the soil and groundwater and contaminate the soil and groundwater.

In fact, so they both otherwise caused but they otherwise meet the legally responsible for provision of 21E making them subject to liability under 21E.

I would disagree very strongly that this eliminates common law liability. What this creates is a different mechanism for allowing for strict liability, but does not -- and there's case law that says this does not eliminate and does

not void, and we cite it in our brief, the common law. It is simply a mechanism under state statute to create liability.

With regard to -- very quickly, on the issue of -- I'm sorry, your Honor, of contribution claim. On the contribution claim, this was -- I disagree very strongly that paragraph, subparagraph (d), only allows a case to proceed if there is a settlement or release of all of these defendants in that underlying claim. There are two paragraphs in paragraph (d), one is if the settlement occurs within the statute of limitations, that does not require release of all defendants. Paragraph 2 is the one that does require release of all defendants.

We argue and would argue that the release, the judgment that was filed, one, puts it under paragraph (c) because it's a judgment; or two, under paragraph (d) is a judgment that was entered prior to the expiration of statute of limitations and the lawsuit was then filed within a year following the judgment.

THE COURT: Okay.

MR. HEAD: Thank you, your Honor.

MR. FLEMING: Your Honor --

THE COURT: Counsel, very briefly.

MR. FLEMING: Very briefly, your Honor, thank you so much.

Back to the property damage claims, Counts I and III.

Mr. Head referred to diminished property values, I think I referred to that in the brief as well. It's simply not pled in the complaint. They had an opportunity previously to amend their damages, they haven't done that. It's not in the complaint. Your Honor, the property damage allegations are the ones that we think you rejected previously.

Secondly, on Twombly and Iqbal, I won't belabor it, suffice it to say there is very, very conclusory -- there are very conclusory added allegations purportedly saying that the defendants' products were used at the training camp. We don't think that's sufficient, your Honor.

And then, your Honor, I think Mr. Head had just said that the Westport case doesn't stand for the proposition that you can void common law damages if you're proceeding under Chapter 21E, that response costs don't void common law damages. I think you've already held to that effect, your Honor, that doesn't mean you can try to seek to recover the same damages, right, you have to try to seek something separate and apart from response costs.

As I just I think articulated, the damages allegations that they set out are really only alleging response costs. They should be estopped from asserting that they have common law damages. They previously said they had none to avoid the statute of limitations, and we lay out that argument in our brief, your Honor, so I remind the Court of that as well.

Thank you.

THE COURT: Thank you, counsel.

I appreciate your arguments and you arguing them within the time limits I gave each side.

I promise you, counsel, I'll go back to your papers with those arguments in mind thank you.

THE CLERK: All rise.

THE COURT: Thank you.

(Court adjourned at 4:04 p.m.)

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CERTIFICATION

I certify that the foregoing is a correct transcript of the record of proceedings in the above-entitled matter to the best of my skill and ability.

/s/Debra M. Joyce
Debra M. Joyce, RMR, CRR, FCRR
Official Court Reporter

July 31, 2018
Date